No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased,

Appellant,

—VS.—

VANCE LUMBER COMPANY, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

B. S. GROSSCUP,
W. C. MORROW,
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ABSTRACT STATEMENT OF THE CASE

Ruby M. Gaunt, a commission broker, brought this action in the United States District Court for the Western District of Washington by bill of complaint to reform a written memorandum signed by the appellee, Vance Lumber Company, by which she was employed to sell certain lands described on a plat accompanying and referred to in said memorandum, and also a logging railroad with its equipment and an operating lumber manufacturing plant the defend-

ant owned in Sections 10, 16 and 17, Township 17 North, Range 5 West, W. M., described in the memorandum:

> "The property consists of saw mill with a capacity of 140,000 feet per eight hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns. We have just recently completed the installation of a 100 K.W. General Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accommodations for 100 people, 65 cottages for the accommodation of employees with families, pool hall and picture show house."

The memorandum in connection with the plat referred to describes specifically a portion of the land covered by the commission contract and in addition, by reference to fixed structures, the operating property consisting of real estate and machinery. The complaint alleges that it was the intention of the defendant to employ the complainant to sell the land specifically described and in addition the land embraced in the operating plant and the machinery, railroad and other personal property. It is alleged that in drawing the memorandum, through inadvertence, fraud or mistake, a specific description of the land connected with its logging and lumbering operations was omitted.

The answer does not deny that the parties intended to enter into an enforcible contract and it does not

deny that the defendant intended to sell and intended to employ the complainant to sell the operating property which included the land occupied by the described buildings and their surroundings connected with and incident to the prosecution of the business.

But the answer alleges, that the description of that part of the operating plant which consisted of land is defective; that the language employed in attempting to describe this operating property by reason of vagueness brings the whole memorandum within the condemnation of the Washington statute of frauds.

The complaint prayed for a reformation of the written memorandum signed by the defendant by supplementing the general description of the operating property with a particular and specific description thereof. The court below denied reformation and after holding that the memorandum signed by the defendant is void at law dismissed the complaint. This appeal is prosecuted to reverse that order, to remand the case to the District Court for reformation of the signed memorandum, and thereafter to enter judgment affording such relief as the complainant is entitled to.

Before the hearing in the District Court, Ruby M. Gaunt, the complainant, deceased, and the case was revived in the name of Carrie Gaunt as executrix of the estate of Ruby M. Gaunt, who is appellant in this court.

In this brief for convenience the appellant's testate is designated "broker" and the appellee, the defendant in the court below, as the "Company".

ASSIGNMENTS OF ERROR

The appellant relies upon each and all of the following assignments of error:

I.

The Court committed error in finding that the testimony in said cause did not show and establish fraud in the execution of the contract sued upon in said cause.

II.

The Court was in error in finding that the testimony in said cause did not show mutual mistake in the execution of the contract sued upon in said cause.

III.

The Court erred in finding that under the testimony in said cause said contract so sued upon in the bill of complaint was within the statute of frauds of the State of Washington and therefore void and unenforcible.

IV.

The Court erred in entering a decree dismissing plaintiff's cause of action.

STATEMENT OF THE EVIDENCE

Prior to February, 1922, the Company had acquired fifteen to twenty sections of timber lands in substantially one body in Grays Harbor and Thurston Counties; had acquired in the vicinity of Malone in Grays Harbor County a mill site, and had built thereon a mill and lumber manufacturing plant, office buildings, hotel, dry kilns, store building, sixty-five cottages for the accommodation of employees' families, pool hall and

picture show house (R. 85), all of which buildings were located in Sections 10, 16 and 17, Township 17, North of Range 5 West, W. M. (R. 19); also about fourteen miles of standard guage railroad with rolling stock and equipment. The plant was equipped with machinery appropriate to the manufacturing of lumber.

About eighteen months prior to the events involved in this litigation W. H. Abel, who had been "intimately associated with the Vance Lumber Company," as its attorney, had sat in on the original purchase when it bought the mill site, and at all times thereafter, and was familiar with the Company's plans with reference to a sale of the property, began negotiations for the sale of the Company's properties through Thomas Bordeaux to the Mason County Logging Company (R. 71). These negotiations with Mr. Abel in behalf of the Company were continued until the sale of the property to the Mason County Logging Company in January, 1924, but no substantial progress was made before August, 1923, when negotiations resulted in an option on August 28, 1923, to the Mason County Logging Company for the purchase of its property (R. 118). This option was consummated by a contract of sale to the Mason County Logging Company January 9, 1924 (R. 20, 86-114).

While these negotiations of Abel with the Mason County Logging Company were in progress the broker and Vance, president of the Company, met in Seattle June 16, 1923. Previously on May 12, 1923, broker and Isaac A. Wilson, had seen Harry B. Dollar at the plant at Malone. Mr. Dollar was the local manager

of the property and one of the directors. He stated that on account of Mr. Vance's illness the Company wanted to dispose of the property. Dollar showed the broker and Wilson the buildings and gave them a list of the equipment (R. 64). During this visit Dollar was asked for a plat describing the Company's holdings offered for sale, which he agreed to furnish. Vance says, referring to the broker's conversation with him in Seattle,

> "I knew at that time that she (referring to the broker) was after a contract for the sale of all our timber and our mill and everything we owned over there, and I talked to Mr. Dollar about it and then as a result of that talk it is a fact that Mr. Dollar wrote that letter to her on July 5, 1923. And at that time I intended to withhold a part of these lands. I intended to hold the logged-off lands, the farm land, the Garden Tracts and the Elma Yard." (R. 70)

As a result of these negotiations between the broker and Mr. Dollar and conferences between Dollar and Vance, the Company mailed to the broker a letter bearing date July 5, 1923, set out in full as Exhibit No. 1 (R. 85 and 86). Mr. Dollar says:

> "The document shown me, Plaintiff's Exhibit No. 1, is a letter I wrote to Miss Gaunt on July 5, 1923. I enclosed a plat with that letter. Plaintiff's Exhibit No. 2 is the plat that was enclosed with the letter." (R. 56)

The original plat has been certified to this court as Exhibit No. 2. The writing at the top in ink and the "W.M." was not put on by Mr. Dollar. All other

writing was put on by Dollar including the colored sections (R. 56). By coloring the sections to be included in a prospective sale, the Company definitely indicated the timber land intended to be sold. Mr. Dollar was asked:

> "Q. Did you intend at that time to sell all of the property that the Vance Lumber Company owned and held, both real and personal— A. No. * * * What properties did you intend to exclude from that sale? A. All the logged-off lands." (R. 58 and 59)

Mr. Vance has described these logged-off lands as being in Sections 2 and 4, Township 17 North, Range 5, Section 32, in Township 18 North, Range 5, and some in Section 26, Township 18 North, Range 5; "Roughly speaking there were about ten or twelve hundred acres logged-off land" (R. 69). The Company's answer says:

> "That it also owned land in Sections 10, 16, 17, Township 17 North, Range 5 West, where the mill, office buildings, hotel, cottages and other buildings in the town of Malone, Washington, is situated." (R. 19)

The Company knew the description of said property and clearly intended to include in the commission contract all of its real and personal property constituting the operating plant.

The Company in a letter to the broker on August 15, 1923, says:

> "As we are giving an option on the property that we offered for sale, please do not do any-

thing further with this until you hear from us again." (R. 117)

This option included all the property except a small tract at Elma which was put into the contract with the Mason County Logging Company a few days before the consummation of that contract. All the land covered by the option and in addition thereto, the Elma yard, put in a few days before the final contract, are described in the final contract entered into, set out in full on pages 86 to 99 of the Record. This contract signed by the Company gives a specific conveyancer's description of the lands in Sections 10, 16 and 17, on which the plant, consisting of the mill and other real estate fixtures were located (R. 88-93 inc.).

Mr. Abel, under whose direction and intimate counsel the defendant was acting, referring to the plat, Exhibit No. 2, made by reference a part of the letter, Exhibit No. 1, said:

"There is no description whatever of the mill-site, which is the most valuable land of all. Q. That was part of the property that was to be sold? A. Yes. Q. And then there were some buildings adjoining for the occupancy of the employees? A. Yes. Q. Is that land described on this plat? A. Not at all. There were some sixty-two houses, I believe, besides the store buildings and theatre. Q. Those lands were entirely omitted? A. Yes; no description in the plat or otherwise in any writing whatever." (R. 75)

The description in the memorandum signed by the Company, Exhibit No. 1 (R. 85), says:

"Referring to our former correspondence regarding a description and price on our holdings we beg to submit the following.

"The property consists of saw mill with a capacity of 140,000 feet per eight hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns. We have just recently completed the installation of a 1000 K.W. General Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accommodations for 100 people, 65 cottages for the accommodation of employees with families, pool hall and picture show house."

The Company does not deny in its answer and admits by its testimony, that the property covered by the foregoing description was, in addition to the timber lands described on the plat, Exhibit No. 2, intended to be sold.

It interposes the defense that no enforcible contract existed because of the defective description of the land on which these buildings stood, and constituted the operating plant.

"This defendant admits that on the 5th day of July, 1923, and at all times thereafter up to and including the 9th day of January, 1924, it was the owner of certain timber, timber and logged-off lands, sawmill, planing mill, shingle mills, dry kilns, dry lumber sheds, office and store buildings, stock of merchandise, hotel, about sixty-five

cottages, pool hall and picture show house." (R. 17)

"That was part of the property that was to be sold? A. Yes." (R. 75)

"The logged-off lands were included in the option to Mason County Logging Company." (R. 76)

Now, referring to testimony of Dollar,

"Did you intend at the time" (July 5th, when Exhibit No. 1 was written), "to sell all of the property that the Vance Lumber Company owned and held, both real and personal— A. No." (R. 58) "What properties did you intend to exclude from that sale? A. All the logged-off land." (R. 59)

Vance says the logged-off lands were in Sections 2 and 4, Township 17, Range 5, and Sections 32 and 26, Township 18, Range 5. These were the lands included in the option to the Mason County Logging Company, but omitted from Exhibit No. 2. The Company "owned land in Sections 10, 16, 17, Township 17 North, Range 5 West, where the mill, office buildings, hotel, cottages and other buildings in the town of Malone, Washington, is situated" (R. 19). The lands in those sections, intended to be included in the broker's authority to sell, are specifically described in Exhibit No. 3 (final contract of sale) on pages 88 to 93 inclusive of the Record. It was clearly the understanding of both the broker and the Company that the broker should have for sale under her contract these lands on which the buildings stood, in addition to the timber lands described on the plat, Exhibit

No. 2. The ommission of the kind of description which the Washington law, as interpreted by its Supreme Court, requires was through a mistake of the Company in drawing the memorandum and of the broker in accepting it in reliance upon the Company's good faith to furnish her a signed memorandum in legal and enforcible form. If there was no mistake as to the legal effect of the descriptive language used in the memorandum by the Company in making the draft, but on the other hand the language employed was intentionally used so that the broker could not collect for her services to be rendered, the Company was guilty of a fraud.

On August 9th the broker wrote to the Company:

> "I have this day submitted your timber and mill property at Malone, to Mark E. Reed of the Simpson Logging Company, and his associates, for their consideration." (Exhibit No. 9, R. 122)

The Company on August 15th wrote:

> "As we are giving an option on the property that we offered for sale, please do not do anything further with this until you hear from us again." (Exhibit No. 5, R. 117)

By this letter the Company recognized the existing contract with the broker. The word "further" shows that it recognized that she had been acting under it in her negotiations with Reed and his associates, and that she was to retain her employment and be available for further assistance upon request.

The option was not consummated until August 28th (Exhibit No. 6. R. 118). The negotiations with the

broker's customer from the date of this letter, August 15th, were conducted wholly by the Company.

We have in this record a complete description sufficient for conveyancing of all the land the broker had a contract to sell. These descriptions were all identified by the signature of the Company by signed documents and references to enclosed plats made a part of the signed documents.

The complaint alleges that the broker after receiving this letter of July 5th, 1923, and acting upon the written assurance of compensation therein contained, immediately set about to secure a purchaser and the complaint alleges that she did secure as a purchaser and was instrumental in consummating a sale to Mason County Logging Company on terms and conditions satisfactory to the Company.

The complaint seeks the preliminary remedy in equity of reformation of the contract evidenced by the letter of July 5, Exhibit No. 1. The statute of Washington (Remington's Comp. Stat. §5825) provides that a contract for a commission for the sale of real estate is void unless the contract or some memorandum thereof is signed by the party to be charged. In numerous law cases the Supreme Court of Washington has held that there can be no recovery by a real estate broker unless the memorandum contains a full and exact description sufficient to constitute a conveyance, if it were a deed. No case has been cited in the lower court or in the Court's opinion where the claimant has sought as a preliminary remedy, reformation of the contract on the ground of fraud or mistake in the drafting of the memorandum.

Before starting to take evidence, the District Court ruled,

> "This is an action to reform a written contract of employment, which is clearly equitable, and for a decree enforcing said contract." (R. 54)
>
> "I am just taking from both of you that we are simply trying to reform a contract here." (R. 55)

And after the complainant had rested, and before the defendant began to submit its evidence, the court said:

> "I understood yesterday that you were simply proceeding to see whether this contract should be reformed. * * * That is all I want to dispose of now. * * * Just to reform. (R. 66) We will proceed and see whether the contract ought to be reformed. * * * I will determine this upon this reformation feature now." (R. 67)

During the progress of the trial while defendant was putting in its evidence, objection was made to evidence offered on the ground that it was not pertinent to the issue as to whether the contract should be reformed, but went to the question of whether the broker was the procuring cause in bringing about a sale. The court said:

> "I think, in the first place, the court must determine whether there is a contract before it can be reformed. I am not going to sit here simply as a bump on a log to see if something shall be done for which there is no basis. The first thing I want to know is whether there is a contract, and then whether it is to be reformed." (R. 72)

At the conclusion of the evidence on the subject of reformation, the court announced orally—

> "The Court cannot now make a contract for these parties. It would be to defeat the very purpose of the statute of frauds of this state, and the laws of this state control the parties as to this suit and limit and define their interest in the matter in issue. The petition for reformation will therefore be denied." (R. 82-83)

ARGUMENT

The District Court erred:

In applying principles of law enunciated in law actions construing the Statute of Washington:

Remington's Compiled Statutes, §5825:

> "In the following cases specified in this section any agreement, contract, and promise shall be void unless such agreement, contract or promise or some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: * * *
>
> "5. An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The District Court further erred:

In applying to a case for reformation the federal rules and principles of equity applicable to a case for specific performance.

The District Court further erred:

In holding that a writing signed by the party to be charged, which through mistake or fraud contains

defective description of the land constituting the subject matter of the commission contract, cannot be reformed by supplying an accurate description and thereby making the contract enforcible at law.

The District Court further erred:

In failing to find that the minds of the parties met upon an agreement which, through mutual mistake of the parties or fraud of the Company, failed to express in such form and with such fullness as the statute requires to make a contract enforcible at law.

A state by statute or decision cannot impair or limit the jurisdiction of Federal Equity courts where uniform principles of equity will be applied in all the states

Reformation being within the jurisdiction of equity, defined by English practice when the Federal constitution was adopted, authorizing Congress to create Federal Courts with jurisdiction at law and in equity, and Congress having conferred upon Federal courts complete equity powers within their jurisdiction over the parties, no state can by legislation or by judicial interpretation of legislation deprive a Federal Court of its full powers to administer equitable remedies. A state law cannot impair the law of the land. In a controversy between citizens of different states a litigant in a Federal Court is entitled to the application of principles established by Federal equity courts.

> "The jurisdiction of the courts of the United States, sitting in equity cannot be controlled by the laws of the States or the decisions of the state courts."
>
> Story's Equity Jurisprudence, 14th Ed. §58.

"State laws subtracting from or limiting the scope of equity do not act upon the equitable powers and jurisdiction held by the national courts."

Pomeroy's Equity Jurisprudence, 4th Ed. §293.

In *Pratt v. Northam*, 5 Mason, 95, Justice Story thus stated the general doctrine:

"It has been often decided by the Supreme Court that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states and is the same which is exercised in the land of our ancestors from whose jurisprudence our own is derived."

"The Circuit Courts of the Union have chancery jurisdiction in every state; they have the same chancery powers, and the same rules of decision in all the states."

United States v. Howland and Allen, 4 Wheaton 108.

Suits in equity shall be "according to the principles, rules and usages which belong to courts of equity, as contra-distinguished from the courts of common law."

Robinson v. Campbell, 3 Wheaton 211, 220.

The Statute of Frauds is no bar to reformation

The plea of the statute of frauds in bar of a claim arising out of a contract as understood by both parties, but not expressed in the written memorandum thereof, in language, required by the statute, after the

parties have entered on performance of the contract as understood, is in itself a fraud. Such a plea is unconscionable and will not be tolerated by a Federal Court of equity.

> " 'The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice.' 1 Story's Eq. Jur., §§754, 759.
>
> This rule finds illustration in cases in this court; in *Neale v. Neales*, 9 Wall. 1, 9, where it was said that 'the statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the ribidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed.' * * *

And in *Townsend v. Vanderwerker*, 160 U. S. 171, 184, where it was said that 'the general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so changed the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defence, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a *quantum meruit* for the value of his services.' 'Courts of equity,' said Lord Cottenham, 'exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were.' "

Whitney v. Hay, 181 U. S. 77, 89.

> "The principle is unalterably fixed in the foundations of the jurisprudence that equity will not suffer a statute passed for the purpose of preventing fraud to be used as an instrument for accomplishing fraud; the statute will be uplifted, when necessary to prevent such a result."
>
> Pomeroy's Eq. Jur., 4th Ed., p. 1783 note.

Fraud and mistake are alike in their effect upon the injured party. It is the purpose of reformation to relieve the injured party. There is therefore no difference in the remedy applied for correcting an instrument wrongly drafted through mistake or wrongly drafted through fraud. For this reason

> "We find judges constantly describing the conduct of persons in such a situation, who insist upon holding the advantages accidentally obtained by mistake, as fraudulent, and the persons themselves as guilty, from a moral point of view, of virtual, if not actual, fraud."
>
> Pomeroy's Eq. Jur., 4th Ed., p. 1782 note.

Washington Supreme Court decisions have no bearing on the issue before this court

The District Judge cited many Washington decisions in support of his opinion denying reformation. The decisions referred to lay down rules for the construction of the statute applicable to a real estate commission contract. These decisions hold that before there can be a recovery at law or a decree for specific performance the real estate must be as accurately described as in a deed of conveyance. These de-

cisions further hold that the court in law actions cannot resort to parol evidence to cure defects and uncertainties in the description. The fundamental error of the district court is the application of these decisions to a reformation case, the purpose of which is to correct the contract sued upon so that in its corrected form it will constitute the basis for damages or specific performance.

If Washington could make a rule of procedure and evidence in a case within federal equity jurisdiction, each other state could make a rule different from each other, and thus destroy the principle of uniformity throughout the Union.

Reformation on the ground of fraud and mistake is a remedy brought from the jurisprudence of England.

> "The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject matter which had been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied, and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing."
>
> Pomeroy's Eq. Jur., 4th Ed., §866.

The cases cited by the learned author abundantly sustain the text. The early New York decisions cited were rendered during the infancy of American equity jurisprudence.

The state decisions go to the construction of the statute and to the application of the statute as construed to the written contract in the form and substance before the court. These decisions have no bearing on the right of reformation, by means of which the signed memorandum before the court will be in its corrected form sufficient to constitute the basis of recovery.

American Merchant Marine Ins. Co. v. Tremaine, 269 Fed. 376.

The District Court misapplied the principles on which some federal cases were decided

The District Court says, "The state statute as construed and applied by the highest court of the state, I think is practically uniformly applied in the federal courts." There is no argument against this proposition, but it is inapplicable. The contract, not as it is written but as it may be reformed by decree of this court, will then be construed and applied according to the state law. But the preliminary right of reformation, so that the contract shall stand clothed with all essentials under the state law, is a fundamental right having its basis in conscience and fair dealing.

The statute of frauds has its basis in policy. The exercise of equity power is based upon a higher law.

It is needless to say that an equity court will not give life to a transaction prohibited by law, but it

may give life to a lawful transaction which has been through mistake expressed in language which makes the real agreement unenforcible.

Parol evidence is competent

Fraud and mistake, being the basis of reformation, are proved in the same way. To hold that a writing in a reformation case cannot be varied, curtailed, supplemented or explained by parol evidence, would be to destroy the whole principle of reformation, the purpose of which is to correct a written instrument by changing it so as to conform to the real agreement of the parties.

In a law action or specific performance action without allegation of fraud or mutual mistake as a basis for reformation, the contract speaks for itself. It is held to express that which the parties intended, but in an equity action to reform on the ground of fraud or mistake it is permissible to show by parol that the contract sued upon was not the entire contract of the parties. An action to reform, based on fraud or mistake by omission from the writing of part of the subject matter of the actual contract, could never be sustained without supplying the omission by parol evidence. Since the right to reform has become firmly grounded in English and American jurisprudence, it must follow that parol evidence, the only kind of evidence which can accomplish the purpose, is competent and will, where such parol evidence clearly establishes fraud or mistake, sustain a decree of reformation.

> "The court of equity has, from a very early period, decided that even an act of Parliament

shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of wills and the statute of frauds."

McCormick v. Grogan, L. R. 4 H. L. 82, 97.

"If the general doctrine of the law" (relating to the effect of parol evidence on written instruments) "or the statute of frauds was regarded as closing the door against such evidence, the injured party would be without any certain remedy, and fraud and injustice would be successful."

Pomeroy's Eq. Jur., 4th Ed., §859.

While written collateral documents signed by the party to be charged are very helpful to the court in deciding cases for reformation, such evidence is not necessary to enable the court to pass a reformatory decree.

"Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong."

2 Pomeroy's Eq. Jur., 4th Ed., §858.

The signed memorandum imports a clear agreement, the subject matter of which is certain. All it lacks is amplification by incorporating descriptive language to put it in enforcible form

The Company clearly intended to sell and intended

to make a binding contract with the broker that she should sell on commission the lands indicated on the plat, Exhibit No. 2, and the lands on which stood the real estate fixtures described, being the saw mill, theatre, hotel, dry kilns, cottages, etc., constituting the operating plant. A description of these lands which constituted the operating plant is definitely ascertainable by connecting together documents signed by the Company with only such explanations as show their connection with the document sought to be reformed.

Beckwith v. Talbot, 95 U. S. 289;
Ryan v. United States, 136 U. S. 68.

It may be conceded that the evidence does not show clearly that the logged-off lands owned by the Company were connected with the logging and lumbering operations of the Company, but the complaint alleges:

> "That at the time the defendant delivered said memorandum of agreement to this complainant it represented to her that the said memorandum contained a description of all its said property then owned by it in Grays Harbor and Thurston Counties, *in connection with its said logging and lumbering operations.*"

This complainant believed and relied upon the representation of the defendant, so made to her, and acted thereon and procured the Mason County Logging Company to buy and the Mason County Logging Company did buy all of defendant's said property (R. 13).

It is then alleged that there was mistake in the draft of the paper by the failure of the Company to

include a specific description of the land constituting a part of its logging and lumbering operations, and that this mistake of the Company resulted in a written document on its face unenforcible at law, whereas it was the clear intention that the contract should be enforcible at law.

The correction of the written document sought in this case is to incorporate a sufficient description of the operating property including real estate which the evidence shows the Company intended to sell, and for procuring a purchaser for that property it agreed to pay a commission.

The prayer is for reformation of the written contract of employment of July 5, 1923 (Exhibits Nos. 1 and 2), by including therein a description of the property omitted, particularly the property described in paragraph V of this bill (R. 12-15). The property described in paragraph V is the land in connection with "its said logging and lumbering operations."

The defendant contends that some of the lands described in the bill (the logged-off lands) were not a part of the operating plant. There is no contention that any land which was not used "in connection with its said logging and lumbering operations" should be included in a reformatory decree. The bill described specifically all the land which the Company owned and in effect alleges that there should be selected out of those descriptions and incorporated in the contract only the land marked on Plat, Exhibit No. 2, and the land connected with and constituting the operating plant.

Equity will correct the defective description if the omission was the result of a mistake of law as to its sufficiency in the form it was signed and accepted

Equity will not by reformation convert an agreement forbidden by law into a valid agreement by changing its terms, but where such agreement is expressed in insufficient language to enable them to prove their actual agreement, equity will reform their written expression of the actual agreement, even though such correction involves a mistake as to the legal sufficiency of the words employed to express the actual and legal intention of the parties.

In *Griswold v. Hazard*, 141 U. S. 260, 284, it is said:

> "While it is laid down that 'a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts,' yet 'the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon this point, both English and American.' *Snell v. Insurance Co.*, 98 U. S. 85, 90, 92; 1 Story Eq. Jur. §138 e and f, Redf. ed.; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 48; *Underwood v. Brockman*, 4 Dana, 309, 316; *Jones v. Clifford*, 3 Ch. D. 779, 791, 792; *Canedy v. Marcy*, 15 Gray, 373, 377; *Green v. Morris & Essex Railroad Co.*, 1 Beasley, 165, 170; *Beardsley v.*

Knight, 10 Vermont, 185, 190; *State v. Paup*, 13 Arkansas 129; 2 Leading Cases in Eq. pt. 1, 979 to 984; 2 Pomeroy's Eq. §§843 to 847."

To the same effect, *MacKay v. Smith*, 27 Wash. 442, 446, in which is quoted with approval Kerr, Fraud & Mistake, p. 399 note:

"Where the legal principle is confessedly doubtful and one about which ignorance may well be supposed to exist, a person, acting under a misapprehension of the law, will not forfeit any of his legal rights by reason of such mistake."

These cases go to the point that mistake as to legal sufficiency is not to be assigned to negligence. The ordinary presumption that the parties know the law does not apply in a case where the law is doubtful.

Without a knowledge of the Washington decisions relating to these commission contracts a person, even a lawyer, when applying the principle, "that that is certain which can be made certain", and the further principle that all collateral documents signed by the party to be charged, with only such oral explanation as is necessary to connect these documents together and show the circumstances under which they were signed, might conclude that the memorandum, Exhibits Nos. 1 and 2, would constitute a good contract at law.

Berry v. Coombs, 1 Peters 636, 649.

Where a written contract is drawn and executed that professes or is intended to carry into execution an agreement previously made in writing or by parol, but by mistake of the draftsman either as to fact or

law the contract as written does not fulfill or violate the manifest intention of the parties, equity will grant reformation so as to conform the writing to the agreement, especially where the writing by omission is defective.

Medical Society v. Gilbreth, 208 Fed. 899.

Where the writing is so worded as not to give legal effect to the intention of the parties, it will be reformed.

Thompson v. Phenix Ins. Co., 136 U. S. 287, 296.

> " 'In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties.' 1 Story, Eq. Jur., p. 164. And Lord Hardwicke remarked in *Henkle v. Royal Exchange Assur. Co.*, 1 Ves. Sr. 317, 'No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified.' * * *
>
> "These principles have become elementary, and it is needless to refer to further authorities to sustain them."
>
> Justice Nelson in *Bradford v. The Union Bank of Tennessee*, 13 Howard 56, 66.

The Company delivered to the broker a signed memorandum pointing out in general words the prop-

erty constituting the operating plant. In the preparation of this memorandum by the Company it is presumed that it intended to legally bind itself to pay the stipulated commission. If the memorandum drawn by the Company and accepted by the broker, through mutual mistake as to its legal sufficiency and completeness, omitted a description of the land in conveyancing language, and if by reason of such omission the paper was not a valid contract at law, this federal court by reformation has power to supply the omitted description, and thereby make the paper a valid and enforcible contract as the parties intended it should be. This principle will be applied even though the Company wrote, and the broker accepted, the writing under the mistaken belief that the document, as written, was sufficient in law to constitute a valid contract. This principle is especially applicable where the document is drawn by the party intending to be bound.

> "In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and *operation* of the terms or language employed in the writing."
>
> Pomeroy's Eq. Jur., 4th Ed., §845.

> "Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the

ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party."

Pomeroy's Eq. Jur., 4th Ed., §847.

"It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties. The fact that interpretation or construction of a contract presents a question of law and that, therefore, the mistake was one of law is not a bar to granting relief. *Snell v. Insurance Co.*, 98 U. S. 85, 88-91; *Griswold v. Hazard*, 141 U. S. 260, 283-284."

Justice Brandeis in *Philippine Sugar &c Co. v. Philippine Islands*, 247 U. S. 385, 389.

The signed memorandum (Exhibit No. 1, R. 85) is not a complete statement of the contract actually entered into, in that the writing does not contain, through mutual mistake or fraud of the Company, a description of part of the land in such form as the Washington statute, as interpreted by the Washing-

ton Supreme Court, requires to make a real estate commission contract enforcible at law. To make the memorandum a binding contract at law it is necessary by reformation to incorporate in conveyancing language a description of the property which the parties by their actual mutual understanding intended to cover.

Rogers v. Lippy, 99 Wash. 312.

But through mutual mistake as to the legal sufficiency in law of the signed paper, by which the Company intended to express its intention to be charged, the paper on its face is a nullity in law. The Company's refusal to comply with its agreement on the ground that it misled, intentionally or mistakenly, the broker into accepting a worthless piece of paper is not consistent with fair dealing.

The minds of the parties met on the actual contract intended to be embraced in the memorandum

The lower court erred in not finding that the minds of the parties met.

The final contract of sale of the Company's property in Grays Harbor and Thurston Counties (Exhibit No. 3, R. 86) describes all the Company's property in those counties. The Elma yard included therein the Company did not intend to sell when it made the arrangement with the broker. The logged-off lands the Company did not intend to sell when it made the arrangement with the broker. The Elma yard and the logged-off lands described by Vance are not in Sections 10, 16 and 17. Clearly the property

the parties intended to cover was all the land indicated on the plat, Exhibit No. 2, and all the land owned by the Company in Sections 10, 16 and 17, Township 17 North, of Range 5 West, W. M. The buildings described in the signed memorandum occupied the lands owned by the Company in these sections (Answer, R. 19).

When the hearing in the court below came on the broker had deceased. Her representative was dependent upon witnesses who had an adverse interest. These witnesses, Dollar, Abel and Vance, all agreed that all the property except the property described by Vance as logged-off lands (R. 69) and the Elma yard was for sale and intended to be covered by the broker's employment. An attempt to describe it is manifest from the memorandum itself. This memorandum was accepted by the broker and acted upon by her.

There is no uncertainty as to the land which was in contemplation. The defect in the memorandum is in the failure to employ descriptive language sufficient to clothe the paper in such terms as the statute of Washington, as interpreted by the decisions of the Supreme Court, requires. The property intended to be described is certain; the terms of employment are certain. When this certainty has been injected into the paper by reformation we will have the binding contract the parties intended to make.

The District Court erred in holding that reformation would be an idle act

The complaint alleges that the broker relying on

her commission contract, which implies reliance on its legal sufficiency, "acted thereon and procured the Mason County Logging Company to buy and the Mason County Logging Company did buy all the defendant's said property."

The issue tendered by this allegation and denied by the Company in its answer has not been tried. The court properly proceeded with the issue of reformation. Having found against the broker on that issue, there was nothing to try. Under the holding of the District Court, without reformation the signed memorandum cannot be enforced. It was contended in the lower court, and we anticipate it will be contended here, that the record clearly shows that the price finally agreed upon between the Company and the purchaser was less than the price named in the signed memorandum. When the case comes to be tried on its merits, the basis for recovery will be the reformed contract and the law of Washington, as interpreted by its Supreme Court, will be applicable to the plaintiff's right to recovery with the same effect as if the reformed contract constituted the memorandum signed by the party to be charged. It will appear that after the broker by letter notified the Company that she had "submitted your timber and mill property at Malone to Mark E. Reed and his associates", the defendant took upon itself the further negotiations of a contract for sale and requested the broker "not to do anything further with this until you hear from us again". All subsequent negotiations were carried on by the Company direct with the assistance of its attorney, W. H.

Abel. Under these circumstances final reduction in price will not constitute a defense.

Duncan v. Parker, 81 Wash. 340;
Godefroy v. Hupp, 93 Wash. 371.

Applying these cases where the price was reduced by the Company without consulting the broker, it was held that the incorporation into the sale of additional land does not defeat the broker of commission.

Miller v. Brown, 115 Wash. 177, 180.

All of these issues, after the contract has been put in enforcible form by reformation will be tried out according to the usual procedure.

Respectfully submitted,

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